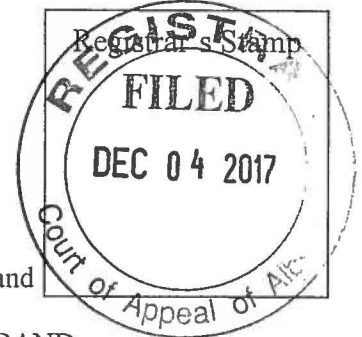


COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NO.: 1703 0252AC
TRIAL COURT FILE NO.: 1103 14112
REGISTRY OFFICE: Edmonton



IN THE MATTER OF THE TRUSTEE
ACT, RSA 2000, C T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND,
INTER VIVOS SETTLEMENT, CREATED BY
CHIEF WALTER PATRICK TWINN, OF THE
SAWRIDGE INDIAN BAND, NO. 19, now known
as SAWRIDGE FIRST NATION, ON APRIL 15,
1985 (the "1985 Sawridge Trust")

APPLICANTS: MAURICE FELIX STONEY and HIS BROTHERS
AND SISTERS

STATUS ON APPEAL: Not a Party to the Appeal

RESPONDENTS (ORIGINAL APPLICANTS): ROLAND TWINN, CATHERINE TWINN,
WALTER FELIX TWIN, BERTHA
L'HIRONDELLE AND CLARA MIDBO, as
Trustees for the 1985 Sawridge Trust (the
"Sawridge Trustees")

STATUS ON APPEAL: Respondents

STATUS ON APPLICATION: Applicants

INTERVENOR: THE SAWRIDGE FIRST NATION

STATUS ON APPEAL: Respondents

STATUS ON APPLICATION: Interested Party

RESPONDENT: PUBLIC TRUSTEE OF ALBERTA ("OTPG")

STATUS ON APPEAL: Not a Party to the Appeal

INTERESTED PARTY: PRISCILLA KENNEDY, Counsel for Maurice
Felix Stoney and His Brothers and Sisters

STATUS ON APPEAL: Appellant

STATUS ON APPLICATION: Respondent

DOCUMENT: **MEMORANDUM OF ARGUMENT OF PRISCILLA KENNEDY
IN RESPONSE TO THE APPLICATIONS BY THE SAWRIDGE
FIRST NATION AND BY THE SAWRIDGE TRUSTEES TO
DISMISS OR STRIKE THE APPEAL BY PRISCILLA
KENNEDY OF SAWRIDGE #8**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT:

Field LLP
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and

CONTACT INFORMATION OF
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Counsel for Sawridge First Nation

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2900 Manulife Place
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Counsel for the Sawridge Trustees

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I. INTRODUCTION

1. Priscilla Kennedy is appealing the case management decision issued September 12, 2017 (referred to as *Sawridge #8*) in which Justice Thomas, in his capacity as case management justice (the “CMJ”), found Kennedy engaged in improper conduct which warranted referral to the Law Society of Alberta.¹ In *Sawridge #8*, the CMJ also issued a Court Access Control Order with respect to Kennedy’s then-client Maurice Stoney. However, Kennedy is only appealing the CMJ’s findings concerning her conduct and submissions on behalf of Stoney.
2. Kennedy’s appeal herein is her second appeal involving a decision by the CMJ to refer her conduct to the Law Society. Kennedy also has an appeal pending in a previous case management decision issued August 31, 2017 (referred to as *Sawridge #7*). In that case the CMJ found her conduct denoted a serious abuse of the judicial system which warranted making her personally liable along with her former client Maurice Stoney for costs awarded against Stoney in a previous case management decision issued on July 12, 2017 (referred to as *Sawridge #6*). The CMJ also concluded that conduct warranted a referral to the Law Society.
3. Kennedy is also awaiting a decision in her application for party status as an appellant in Stoney’s appeal of *Sawridge #6*, in which the CMJ dismissed Stoney’s underlying application and concluded the application involved serious litigation misconduct.
4. The Law Society received a copy of *Sawridge #7* and *Sawridge #8* from the CMJ and is presently holding its complaint file in abeyance pending the outcome of these appeals.² Kennedy submits in these circumstances her appeal is neither moot nor ungrounded in a result of the CMJ decision.

a) Kennedy’s appeal is from the decision as pronounced on September 12, 2017

5. The decision Kennedy appeals from was pronounced on September 12, 2017. Pursuant to Rule 14.8(2)(a)(iii), Kennedy’s Notice of Appeal was required to be filed within one month after the date of decision. The “date of decision” is defined at Rule 14.8(1) as follows:

¹ *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 at paras 113-122 and 125 [Sawridge Trustees’ Materials, Tab 1]

² Affidavit of Priscilla Kennedy, sworn on November 30, 2017 (“Kennedy Affidavit”)

Filing a notice of appeal

14.8(1) In this rule, “date of decision” means the later of

- (a) the date that the judgment, order or other decision being appealed is made, or
- (b) if reasons are given after a judgment, order or other decision being appealed is made, the date the reasons are issued.

6. As of October 11, 2017 when Kennedy filed her Notice of Appeal, the parties were still corresponding with respect to the wording of the formal order. Much but not all of this correspondence is set out in Exhibits C and D of the Affidavit of Susan Hagerman in Support of the Application filed by the Sawridge Trustees (the “Hagerman Affidavit”). It is clear from this correspondence that when Kennedy filed her Notice of Appeal on the eve of the appeal period, the parties were in agreement that the CMJ’s order included the referral to the Law Society.

7. On October 16, 2017 Kennedy’s counsel provided an amended draft order which included a term setting forth the CMJ’s conclusions with respect to Kennedy’s conduct. The draft order and the explanation provided are found at Exhibit C, Appendix 3 of the Hagerman Affidavit. In short, the wording proposed by Kennedy’s counsel was consistent with the CMJ’s pronouncement on September 12, 2017 via his written reasons, and with formal Orders the CMJ approved in *Sawridge #6*³ and *Sawridge #7*⁴, both of which were entered on October 6, 2017.

8. When counsel for Sawridge First Nation wrote to the CMJ on October 23, 2017 with agreement from counsel for the Sawridge Trustees, the draft order they proposed be signed in relation to *Sawridge #8* included the Court Access Control Order with respect to Stoney and the referral to the Law Society with respect to Kennedy.⁵ As an alternative, they suggested it was open to the Court to take the position that no further Order was required beyond what was set out in the Court Access Control Order, which makes no mention of Kennedy.⁶

9. The CMJ informed the parties by letter dated November 10, 2017 that a further Order in relation to *Sawridge #8* was unnecessary. No reasons for that conclusion were given.⁷ Kennedy

³ Order Re: Sawridge #6, entered October 6, 2017 at para 6 [Tab 1]

⁴ Order Re: Sawridge #7, entered October 6, 2017 at paras 1 and 4 [Tab 2]

⁵ Hagerman Affidavit, Exhibit C, Appendix 8

⁶ Hagerman Affidavit, Exhibit B

⁷ Hagerman Affidavit, Exhibit E

notes that in contrast, the order signed by Justice Thomas in *Sawridge #7*, specifically includes the decision to refer the decision to the Law Society.

10. At the time Kennedy filed her Notice of Appeal in relation to *Sawridge #8*, the CMJ's words and actions made clear the nature of the decision from which she was appealing. Kennedy's appeal should not be precluded by the CMJ's subsequent decision not to set forth this decision in a formal order.

b) This is an appeal from a disposition not reasons

11. We agree that appeals are from dispositions in the court below, not from reasons.⁸ The CMJ's finding that Kennedy engaged in improper conduct which warranted referral to the Law Society is a disposition. On September 13, 2017, the day after making this disposition, the CMJ sent a copy of the decision to the Law Society.⁹ This action should be enough to dispel the suggestion made by the Sawridge Trustees that any discussion in *Sawridge #8* relating to Kennedy's conduct amounts merely to comments made in *obiter*.¹⁰

12. The authorities cited by the Sawridge Trustees are easily distinguished. In *NAC Constructors*, the Court dismissed a cross-appeal which was merely an attempt to obtain the Court's opinion on two observations made by the lower court. In *R v Elliot*, the appellant was satisfied with the disposition of the matter below, but not with the lower court's reasons for it. *Chisholm v Lindsay* dealt with a situation where an ambiguity in the formal judgement could be resolved by reviewing the reasons.¹¹

13. Here we are not facing an ambiguity in the formal order, but an unexplained absence of any formal order concerning the CMJ's disposition of matters concerning Kennedy. And yet this disposition is clear from the CMJ's written decision and his actions in sending the decision to the Law Society. Kennedy should not be deprived of her right to appeal this disposition as a result of the CMJ's decision to disregard it entirely when it came to constructing the formal order.¹²

⁸ *NAC Constructors Ltd. v Alberta (Capital Region Wastewater Commission)*, 2005 ABCA 401 at para 11 (“*NAC Constructors*”) [Sawridge Trustees' Authorities, Tab 3]; *R v Elliot*, 2014 ABCA 431 at para 4 [Sawridge Trustees' Authorities, Tab 4]

⁹ Kennedy Affidavit, Exhibit B

¹⁰ See paras 2 and 7 of Sawridge Trustees' written submissions

¹¹ *Chisholm v Lindsay*, 2017 ABCA 21 [Sawridge Trustees' Authorities, Tab 5]

¹² *Ibid* at para 8, citing *3464920 Canada Inc. v Strother*, 2010 BCCA 328 at para 27 where the Court cites Chief Justice Taschereau's remarks in *Quebec, Jacques-Cartier Electric Co. v. The King*, 51 SCR 594 at 601

c) This appeal has practical consequences for Kennedy and is not moot

14. While the Sawridge Trustees are correct in stating that the act of sending the decision in *Sawridge #8* to the Law Society cannot be reversed, that does not make Kennedy's appeal moot. Where the conduct of a lawyer is brought to the attention of the Law Society by the Court and is based on the Court's findings, it stands to reason that the Law Society will wish to know of any higher court's decision respecting those findings. This is evidenced by the fact that the Law Society is holding its file in abeyance pending the outcome of this and the related appeals.¹³

15. If the CMJ's findings concerning Kennedy's conduct are overturned on appeal, it is reasonable to expect this would be dispositive in the Law Society's decision under s. 53 of the *Legal Professions Act* as to whether to dismiss the matter.¹⁴ In no way are we suggesting that members of the bench should be prevented from referring a lawyer's conduct to the Law Society.

d) Determination of this appeal is necessary to fully address the CMJ's findings concerning Kennedy

16. The CMJ's findings with respect to Kennedy's conduct and submissions in *Sawridge #8* are inextricably linked to findings previously made in *Sawridge #6* and *#7*, which are currently subject to appeal. In *Sawridge #7* the CMJ concluded Kennedy's conduct and submissions in *Sawridge #6* amounted to serious misconduct warranting personal costs liability and a referral to the Law Society. In *Sawridge #8*, the CMJ characterizes Kennedy's submissions on behalf of Stoney with respect to his potential vexatious litigant status as a further attempt to reargue the legal issues raised in *Sawridge #6* and concluded this further attempt to raise "settled issues"¹⁵ was serious misconduct warranting a further referral to the Law Society. As such, determination of Kennedy's appeal from *Sawridge #8* is necessary to fully address the CMJ's matrix of findings concerning Kennedy.

17. Regarding the Sawridge Trustees' submission that Kennedy is not a party to *Sawridge #8* and therefore has no right to appeal, we are unaware of any authority stating that a lawyer must

¹³ Kennedy Affidavit, Exhibit F

¹⁴ *Legal Professions Act*, RSA 2000, c L-8, s. 53 [Tab 3]

¹⁵ *Sawridge #8* at para 117 [Sawridge Trustees' Materials, Tab 1]

apply for party status in order to appeal a decision concerning the lawyer's conduct. Kennedy's status as counsel, not a party, was not bar to her pursuit of an appeal from *Sawridge #7*.¹⁶

II. RELIEF SOUGHT

18. Kennedy asks the Court to dismiss this Application with costs payable forthwith and in any event of the cause.

19. If the Court considers it necessary, Kennedy also asks the Court to permit or direct an amendment to her Notice of Appeal to include a third issue on appeal: whether the CMJ erred by declining to issue a formal order setting forth his finding that Kennedy engaged in serious misconduct warranting referral to the Law Society.¹⁷

All of which is respectfully submitted this 4th day of December, 2017.

FIELD LLP
Counsel for the Applicant

Per: 
for P. Jen Faulds, QC


Kimberly Precht

¹⁶ For clarity, an application for party status with respect to *Sawridge #6* was only necessary because the findings in *Sawridge #6* as against Kennedy only crystalized upon the decisions in *Sawridge #7* and *#8* being issued, after the appeal period for *Sawridge #6* had ended.

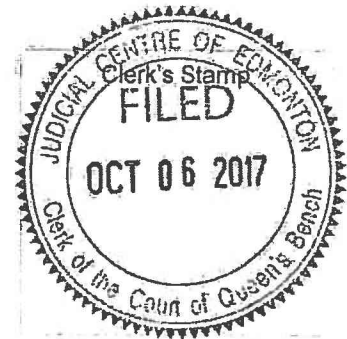
¹⁷ Pursuant to the Court's procedural powers under Rule 14.73(b) [Tab 4]

Appendices

1. Order Re: Sawridge #6, entered October 6, 2017
2. Order Re: Sawridge #7, entered October 6, 2017
3. *Legal Professions Act*, RSA 2000, c L-8, excerpt
4. Alberta Rules of Court, Alta Reg 124/2000, excerpt

TAB 1

COURT FILE NUMBER 1103 14112
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON



IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS: MAURICE STONEY and HIS BROTHERS AND SISTERS

RESPONDENTS: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees") and

THE OFFICE OF THE PUBLIC TRUSTEE AND GUARDIAN ("OPGT")

INTERVENOR SAWRIDGE FIRST NATION aka THE SAWRIDGE BAND ("SFN")

DOCUMENT ORDER RE: SAWRIDGE #6

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Dentons Canada LLP
2900, 10180 101 Street
Edmonton, AB T5J 3V5
Attention: Doris Bonora
Telephone: (780) 423-7188
Facsimile: (780) 423-7276
File No.: 551880 -1

DATE ON WHICH ORDER WAS PRONOUNCED:

July 12, 2017

LOCATION WHERE ORDER WAS PRONOUNCED:

Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER:

Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of Maurice Stoney and his brothers and sisters to be added as parties or intervenors in the within action as beneficiaries of the 1985 Sawridge Trust and for the legal costs of Maurice Stoney and his brothers and sisters to be paid by the 1985 Sawridge Trust;

AND UPON THE APPLICATION of the Sawridge First Nation to be added as an intervenor in the application of Maurice Stoney and his brothers and sisters and for an Order striking and/or dismissing the application of Maurice Stoney and his brothers and sisters;

AND UPON THE APPLICATION of the Sawridge Trustees that Security for Costs be posted by Maurice Stoney and his brothers and sisters in the event they are added as parties or intervenors in the within action;

AND UPON THE DIRECTION of the Case Management Justice that the applications herein be dealt with in writing; AND UPON HAVING READ the written submissions herein from counsels for Maurice Stoney and his brothers and sisters, the Office of the Public Trustee and Guardian, the Sawridge First Nation, and the Sawridge Trustees; AND UPON THE DELIVERY of written reasons for the decision of the Honourable Mr. Justice D.R.G. Thomas dated July 12, 2017;

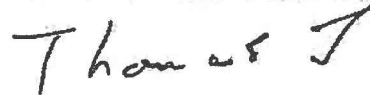
IT IS HEREBY ORDERED THAT:

1. Sawridge First Nation is granted intervenor status herein with respect to the Application by Maurice Stoney and his brothers and sisters only;
2. The Application by Maurice Stoney and his brothers and sisters is limited to Maurice Stoney alone and will not involve his "10 living brothers and sisters";
3. The application by Maurice Stoney is dismissed;
4. The application by the Sawridge Trustees for security for costs need not be addressed;
5. The Sawridge First Nation and the Sawridge Trustees are awarded solicitor and own client indemnity costs against Maurice Stoney;

6. Counsel for Maurice Stoney, Priscilla Kennedy, has advanced a futile application which has been identified by the Court as abusive and vexatious and as a result, Priscilla Kennedy shall appear before this Court at 2:00 p.m. on Friday, July 28, 2017 to make submissions on why she should not be personally responsible for some or all of the costs awards against Maurice Stoney. The Sawridge First Nation and the Sawridge Trustees should appear on July 28, 2017 to comment on this issue and may introduce evidence as indicated in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 (CanLII), paragraphs 33 and 34.
7. Maurice Stoney is subject to an Interim Court Filing Restriction on terms set out in the Order filed herein on July 12, 2017;
8. Maurice Stoney shall, if he chooses to do so, make written submissions by close of business on August 4, 2017 on whether his access to the Alberta courts should be restricted, and if so, what the scope of such restrictions should be;
9. The Sawridge First Nation and the Sawridge Trustees may make submissions on Maurice Stoney's potential vexatious litigant status and introduce additional evidence that is relevant to this question by the close of business on July 28, 2017.



Honourable Justice D.R.G. Thomas



Entered this _____ day of October, A.D. 2017

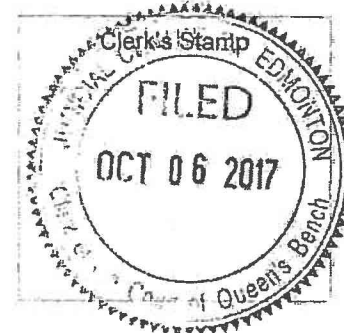
CLERK OF THE COURT

TAB 2

COURT FILE NUMBER 1103 14112

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON



IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")

[Handwritten signature and scribbles over a faint stamp]

APPLICANTS: MAURICE STONEY and HIS BROTHERS AND SISTERS

RESPONDENTS: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridgè Trustees") and

THE OFFICE OF THE PUBLIC TRUSTEE AND GUARDIAN ("OPGT")

INTERVENOR SAWRIDGE FIRST NATION aka THE SAWRIDGE BAND ("SFN")

DOCUMENT ORDER RE: SAWRIDGE #7

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Dentons Canada LLP
2900, 10180 101 Street
Edmonton, AB T5J 3V5
Attention: Doris Bonora
Telephone: (780) 423-7188
Facsimile: (780) 423-7276
File No.: 551880 -1

DATE ON WHICH ORDER WAS PRONOUNCED:

August 31, 2017 (Sawridge #7)

LOCATION WHERE ORDER WAS PRONOUNCED:

Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER:

Honourable Justice D.R.G. Thomas

UPON THIS COURT'S DIRECTION that Priscilla Kennedy appear before me at 2 p.m. on Friday, July 28, 2017, to make submissions on why she should not be personally responsible for some or all of the costs awarded against her client, Maurice Stoney; in Case Management Decision (Sawridge #6) herein;

AND UPON THIS COURT'S FURTHER DIRECTION that counsels for the Sawridge First Nation and the Trustees of the 1985 Sawridge Trust should appear to comment on this issue and may introduce evidence as further described at paragraph 81 of Case Management Decision (Sawridge #6);

AND UPON HAVING READ THE AFFIDAVITS filed on behalf of Priscilla Kennedy only;

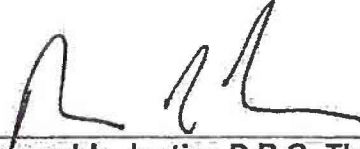
AND UPON HAVING HEARD what was said by the counsels for Priscilla Kennedy, the Sawridge First Nation and the Trustees of the 1985 Sawridge Trust;

AND UPON THE DELIVERY OF WRITTEN REASONS FOR DECISION of Honourable Mr. Justice Thomas dated August 31, 2017, entitled Case Management Decision (Sawridge #7);

IT IS HEREBY ORDERED THAT:

1. Priscilla Kennedy has conducted an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system on two independent bases:
 - (a) Priscilla Kennedy conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court; and
 - (b) Priscilla Kennedy conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis (150).
2. Priscilla Kennedy and Maurice Stoney are liable jointly and severally for solicitor and client indemnity costs of the Sawridge Trustees and the Sawridge First Nation. (150, 152, 153 and 154).

3. Maurice Stoney, Priscilla Kennedy, the Sawridge Trustees and Sawridge First Nation may return to the Court if they require assistance to determine the costs payable. Costs are payable immediately. (155)
4. A copy of Case Management Decision (Sawridge #7) shall be delivered to the Law Society of Alberta for its review.



Honourable Justice D.R.G. Thomas

Thomas

Entered this _____ day of October, A.D. 2017

CLERK OF THE COURT

TAB 3

Division 1
Proceedings Respecting Conduct
Deserving of Sanction

Review by Executive Director

53(1) Any conduct of a member that comes to the attention of the Society, whether by way of a complaint or otherwise, shall first be reviewed by the Executive Director.

(2) If the conduct that comes to the attention of the Society under subsection (1) involves a dispute between the member and another person, the Executive Director,

- (a) before commencing a review of the matter pursuant to subsection (1), may attempt to resolve the dispute, and
- (b) if the dispute is resolved to the satisfaction of the member and the other person, may direct that no further proceedings be taken under this Part in respect of the matter.

(3) The Executive Director, in the course of a review under subsection (1), may do either or both of the following:

- (a) require the complainant or the member concerned to answer any inquiries or to furnish any records that the Executive Director considers relevant for the purpose of the review;
- (b) direct that the conduct be investigated.

(4) On the completion of a review under subsection (1), the Executive Director shall either

- (a) direct that the matter be dismissed, or
- (b) refer the matter, together with the Executive Director's report respecting the review,
 - (i) to the Practice Review Committee,
 - (ii) to the Conduct Committee, or
 - (iii) to both Committees.

(5) If the conduct of a member comes to the attention of the Society by way of a complaint, the Executive Director shall endeavour to resolve the complaint but shall perform the duties under subsections (1) to (4) whether the complaint is resolved or not.

TAB 4

Binding precedents

14.72 Unless permission has been granted under rule 14.46 by a panel of the Court of Appeal, no party may argue that a prior precedential decision of the Court should be reconsidered.

AR 41/2014 s4

**Subdivision 3
Powers of the Court****Procedural powers**

14.73 In addition to the powers provided for in other Parts of these rules, a single appeal judge or a panel of the Court of Appeal may

- (a) adjourn any appeal or matter, with or without conditions,
- (b) cure any contravention, non-compliance or irregularity in procedure, or permit or direct any amendment or any deviation from the requirements of these rules with respect to the form or filing of any document,
- (c) render judgment at any time,
- (d) render or sign judgment on behalf of another judge or a panel when authorized to do so,
- (e) inspect any property in accordance with an order made under rule 6.26, and
- (f) hear any appeal or application electronically under rule 6.10.

AR 41/2014 s4

Application to dismiss an appeal

14.74 On application, a panel of the Court of Appeal may dismiss all or part of an appeal and may make any order that the circumstances require, including a costs award, if

- (a) the Court of Appeal has no jurisdiction,
- (b) the appeal is moot,
- (c) the appeal is frivolous, vexatious, without merit or improper, or
- (d) the appeal or any step in the appeal is an abuse of process.

AR 41/2014 s4